IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 26TH NOVEMBER 2007 / 5TH AGRAHAYANA 1929

MFA.No. 266 of 2003()

WCC.42/1997 of W.C.C.,KOTTAYAM
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APPELLANT: 2NDOPP. PARTY

NEW INDIA ASURANCE COMPANY LTD.,
BRANCH OFFICE, KANJIKUZHI, KOTTAYAM.

BY ADV. SRI.RAJAN P.KALIYATH

RESPONDENTS: APPLICANT AND OPP.PARTY 1 & 3
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1. JOSE VARGHESE, CHATHANMALAYIL,
KATTATHI, ETTUMANNOOR POST, KOTTAYAM

2. MR.THOMAS GEORGE, KAKKUZHIYIL HOUSE,
S.H.MOUNT POST, KOTTAYAM

3. BABY, CHAMAKALA HOUSE, CHERUVANDOOR,
ETTUMANNOOR (DELETED)

THE NAME OF R3 IS DELETED FROM THE
PARTY ARRAY AT THE RISK OF THE APPELLANTS
VIDE ORDER DATED 13.4.2007 IN I.A. NO.884 OF 2007.

BY ADV. SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE
SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 26/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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M.F.A. NO. 266 OF 2003

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Dated this the 26th day of November, 2007

J U D G M E N T

The New India Assurance Co. Ltd., second opposite party in W.C.C. No. 42 of 1997 on the file of the Commissioner for Workmen's Compensation (Deputy Labour Commissioner), Kottayam, is the appellant. Appeal is filed against the judgment passed by the Commissioner granting compensation to the applicant first respondent.

2. First respondent filed an application claiming compensation under the Workmen's Compensation Act. He was a driver by profession. It was averred that on 13.1.1996 at about 1.30 a.m. the first respondent was driving an Autorikshaw bearing Reg. No.KL-5/D-573. When the vehicle reached the place of incident, it hit against a mango tree and the first respondent sustained injuries. First respondent filed the application claiming compensation initially against Shri Thomas George and the appellant alone. Subsequently, he impleaded Shri Baby as the owner of the vehicle. Second respondent in the appeal, who was impleaded as the first

opposite party in the application, denied the employer-employee relationship. He also contended that the first respondent is not entitled to claim any compensation. Existence of valid policy was admitted by the appellant.

3. The Deputy Labour Commissioner found that the first respondent was driving the vehicle and he was employed by the additional third opposite party, who was the registered owner of the vehicle. It was also found that the first respondent was having a valid licence and badge. The Commissioner directed the appellant to pay a compensation of Rs.62,976/- with 12% interest from the date of accident. Challenging that order, this appeal is filed.

4. The main dispute is regarding the fixation of percentage of loss of earning capacity. First respondent produced Exhibit A3, a disability certificate issued by the Doctor attached to the Medical College Hospital. Exhibit A3 shows that the first respondent was having 11% disability. But at the time of oral evidence, Doctor gave evidence to the effect that on account of the permanent disability the loss of earning capacity as an Autorikshaw driver will be 25%. The

Commissioner found that while physical disability is constant, loss of earning capacity will change in the future, but considering the oral evidence of the Doctor, compensation was fixed.

5. In the medical certificate the Doctor did not fix the loss of earning capacity. Further, his evidence was to the effect that the loss of earning capacity was for driving Autorikshaw alone. What exactly was the loss of earning capacity in general was not fixed. So the compensation fixed was not proper. It is only just and proper that the appellant be given an opportunity to get the loss of earning capacity assessed by a Medical Board. For that purpose, the case has to go back. Appellant may file an application before the Commissioner for a direction to the first respondent to appear before a Medical Board for fixing his disability as well as loss of earning capacity. In case such an application is filed, the Commissioner shall pass appropriate orders in the matter in accordance with law.

6. In the result, the appeal is allowed in part. The impugned order is set aside and the case is remanded. The

Commissioner is directed to take W.C.C. No.42 of 1997 back to file and dispose of the same in accordance with law after affording a reasonable opportunity to both sides to adduce evidence, if so advised and after obtaining a report from the Medical Board regarding the disability and earning capacity of the first respondent.

Civil Miscellaneous Application No.119 of 2003 shall stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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M.F.A. NO. 266 OF 2003

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J U D G M E N T

26TH NOVEMBER, 2007